bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty, and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives. In my opinion any other rule of law would not only be socially intolerable, but inconsistent with the real principle underlying the long line of cases and expressly mentioned in several of them though in slightly varying language, namely, that there must be no substantial digression from the path to which their marriage vows have bound the parties, of what is sometimes called in old but telling words 'conjugal kindness.' A 'matrimonial' or 'marital' offence within the cognizance 'of the Divorce Court' in my opinion simply means conduct which in the eye of that court is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree, provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty."

Similarly, cruelty which has been condoned may be revived as a matrimonial offence by subsequent desertion and for this purpose desertion for three years need not be established. *Beard* v. *Beard* was applied in *Kafton* v. *Kafton* [6] in which Tucker L.J. said:—

"It has been decided by this court in *Beard* v. *Beard* that to revive a previous matrimonial offence which has been condoned it is not necessary to establish desertion for the full period of 3 years, but that desertion for a shorter period will suffice. *Beard* v. *Beard* dealt with the revival of condoned adultery and counsel for the husband formally took the point that it was wrongly decided so that he might argue the point elsewhere. I think it is clear that no distinction can be drawn between the present case and *Beard* v. *Beard*, and that the reasoning of the judges in that case applies equally to a case of cruelty as to a case of adultery."

Thus, the wife's cruelty was revived by her continued desertion after 13th March, 1963.

In the result I will make a *decree nisi* on the husband's petition on grounds of cruelty and desertion, such *decree nisi* to be made absolute in three months. I will hear arguments on the question of costs.

Decree nisi made.

Solicitors: *Lovelace & Hastings*; *Jayadeva, Zahir & Ismi.*

AUGUSTINE v. COMMISSIONER OF POLICE, MALAYA

[O.C.J. (Ong J.) July 8, 1964]

[K.L. — Originating Motion No. 7 of 1964]

Administrative Law — Suspension of officer from exercise of his office — Whether judicial or administrative act — Disciplinary proceedings — Foreign conviction — Public Officers (Conduct and Discipline) Regulations, 1956, regs. 38, 40 and 43 — Police Force Ordinance, 1952, s. 52.

Certiorari — Whether lies in respect of administrative act.

This was an application for an order of *certiorari* to remove for the purpose of being quashed an order of the commissioner of police suspending the applicant from the exercise of his office of assistant superintendent of police. The facts were that the applicant was travelling from Thailand to Alor Star, when his car was stopped and opium found in it. The applicant was convicted by a court in Thailand. The applicant was subsequently informed that disciplinary proceedings were contemplated against him and he was suspended from duty with effect from the date of his conviction. The applicant was informed that disciplinary proceedings were contemplated by reason of his conviction, but subsequently following objection by his counsel he was informed of an additional charge alleging that he had conducted himself in such a way as was considered prejudicial against the good name and integrity of the Royal Federation of Malaya Police and the Federation as a whole. A committee was appointed to investigate the charge against the applicant and he was informed that he would be notified of the time, date and place of the sitting of the committee.

Held: (1) the act of the commissioner of police in this case in suspending or interdicting the applicant was an administrative act and therefore *certiorari* did not lie;

(2) although the foreign conviction could not give the commissioner of police jurisdiction to exercise any of his powers under regulation 43 of the Public Officers (Conduct and Discipline) Regulation, 1956, in this case there was the additional charge of misconduct under regulation 38 of the Regulations and therefore the order of the commissioner of police in suspending the applicant was not invalid.

Case referred to:—

(1) *R.* v. *Metropolitan Police Commissioner, ex parte Parker* [1953] 2 All E.R. 717 at p. 721.

The following cases were also referred to in argument:—

Dunn v. *R.* [1896] 1 Q.B. 116 at p. 119, Lord Esher, Lord Herschell; *Gould* v. *Stuart* [1896] A.C. 575, P.C.; *Shenton* v. *Smith* [1895] A.C. 229; *Rederiakticblolaget Amphitrite* v. *R.* [1921] 3 K.B. 500 Rowlett, J.; *Oswald Hugh Pedro* v. *State of Hyderabad* A.I.R. 1953 Hyd. 98; *Mohamed Hussein* v. *State of Hyderabad* A.I.R. 1953 Hyd. 298; *Krishnamoorthy* v. *State of Madras* A.I.R. 1951 Mad. 888; *Province of Bombay* v. *K. S. Advani* A.I.R. 1950 S.C. 221; *Yusof Ali Khan* v. *Province of Punjab* A.I.R. 1950 Lahore 59; *I.M. Lall* v. *High Commissioner for India* A.I.R. 1948 P.C. 121; *Venkata Rao* v. *Secretary of State* A.I.R. 1937 P.C. 31; *Rangchari* v. *Secretary of State* A.I.R. 1937 P.C. 27; *Lilawata* A.I.R. 1952 Madhya Bharat 105; *Kewal Mal Singh* v. *Heta Ram* A.I.R. 1952 Rajasthan 17; *Gian Singh* v. *The Bank of China Ltd.* [1948] M.L.J. 86; *In re Application by Loke Wan Tho* [1956] M.L.J. 149; *Choo Yin Loo & Ors.* v. *Registrar of Societies* [1957] M.L.J. 228; *Munusamy* v. *P.S.C.* [1960] M.L.J. 220; *Terrell* v. *S.S. Colonies* [1953] 2 Q.B. 482; *Lucas* v. *Lucas & H.C. for India* [1943] 2 All E.R. 110; *King* v. *Dunsheath* [1950] 2 All E.R. 741; *Melayu Raya Press* v. *Colonial Secretary* [1951] M.L.J. 89; and *Cox* v. *The Army Council* [1962] 1 All E.R. 880.

ORIGINATING MOTION.

N. Ramachandran for the applicant.

Salleh bin Abbas (Federal Counsel) for the respondent.

Ong J.: This was an application for an order of *certiorari* to remove into this court for the purpose of being quashed an order of the Commissioner of the Royal Malayan Police suspending the applicant from the exercise of his

office of assistant superintendent of police as from February 26, 1963. Leave to apply for such an order had been given on April 8, 1964 by Gill J. On June 1, 1964 I heard the application and dismissed it with costs. Notice of appeal was filed on June 27, 1964.

The applicant at the relevant time held the acting rank of deputy superintendent of police and was posted at Songkhla, South Thailand, as Malayan Police Liaison Officer. On November 19, 1962, he was travelling in his own car, NA. 5184, from Songkhla to Alor Star in the company of a Malayan police constable, WT/PC. 30204, when the events happened which led to his conviction by a court in Thailand. So far the facts were undisputed.

What occurred on the way is set out in the letter of July 10, 1963 from the Commissioner of Police to the Police Force Commission. I quote below the relevant statement of facts.

"On arrival at the Thai Boundary Post, Mr. Augustine entered the details of his car as required in the Thai Customs Book, by himself. He signed it. However, the customs barrier was closed. The customs officers appeared and asked him if there was anything for checking. Mr. Augustine said that there was nothing. Just as the customs officer was opening the barrier another customs officer ran up and stopped the barrier from being opened.

Mr. Augustine was asked to open the boot of his car for inspection but he asserted authority and refused the inspection. He turned his car around and proceeded towards Sadao town. The distance between the Boundary Post and Sadao town is about six miles. The customs officers noticed that the back portion of his car was sagging, indicating that there was considerable load in the boot. The customs officer gave chase in a taxi. Shortly afterwards the car NA. 5184 was seen stopping by the roadside and Mr. Augustine was seen opening the boot of his car and throwing a parcel and then hurriedly getting into his car and driving off. But before he could make a headway, the customs officers who were chasing him in a taxi had overtaken him and forced him to stop. At this stage a jeep carrying other customs officers and a policeman from Sadao had arrived.

Mr. Augustine's car was searched and in the boot of the car was found four boxes containing 91 slabs of opium weighing approximately 400 lbs. The value of the opium as given by the Thai authorities was approximately M$300,000. Mr. Augustine and PC. 30204 Wong Yew Chong were arrested and detained."

On February 26, 1963, the applicant was charged in the Thai Military Court at Songkhla for (1) possession of opium without lawful authority and (2) attempted evasion of duty upon the unauthorised export of opium from Thailand. He pleaded guilty to both charges, and was sentenced to two years imprisonment on each charge. Under section 78 of the Criminal Law of Thailand, this term of imprisonment was reduced, in consideration of his past services to Thailand, to two years imprisonment.

By letter dated February 27, 1963 the applicant was notified of his suspension from duty with effect from the date of his conviction. In this letter the suspension was stated to have been ordered "under regulation 43 of the Public Officers (Conduct and Discipline) Regulations, 1956," by reason of his conviction at the Criminal Court in Songkhla, and he was further informed that proceedings under regulation 40 of the same Regulations were being contemplated and that during his suspension he would receive no emoluments *"pending decision by the Disciplinary Authority."*

On July 10, 1963 the matter was referred to the Police Force Commission with a view to disciplinary action being taken against the applicant and his dismissal was recommended in purported pursuance of General Orders, Cap. D. 40.

On July 31, 1963, the Secretary of the Police Force Commission notified the applicant that the Commissioner of Police had recommended his dismissal under Cap. D. 40 of General Orders, concluding the letter as follows:

"In accordance with the requirement of article 135(2) of the Federal Constitution I am to invite you to submit such representations as you may wish within fourteen days from receipt of this letter."

On August 16, 1963, the applicant's solicitor, Mr. N. Ramachandran, replied to the above letter, claiming that his client had a right to be "heard" under article 135(2), instead of merely making representations, and that Cap. D. 40 of General Orders applied only to a conviction in the courts of this country. The reply went on to state that the applicant denied the charges framed by the Thai authorities as well as the particulars of the case alleged by the Commissioner of Police (quoted earlier in this judgment), and that he had pleaded guilty by reason of intimidation and denial of legal representation at his trial. An extract from a letter written by the applicant to his solicitor was enclosed. Therein he maintained that he was innocent, but in that extract of over two pages I looked in vain for a denial of what I considered the material facts brought to the notice of the Commissioner of Police which led to the order suspending the appellant from duty. The material facts, not challenged, were that he was carrying approximately 400 lbs. of opium in his car and his destination was Alor Star, in Malaya, so that immediately upon his entering on Malayan soil he would have been acting in contravention of the Dangerous Drugs Ordinance, 1952.

Following the objection to the applicability of Cap. D. 40 of General Orders, the Police Force Commission informed the applicant by letter dated November 25, 1963 that an additional charge under Cap. D. 38 would be made against him as follows:

"That you on the 19th November, 1962, being an officer of the Royal Federation of Malaya Police conducted yourself in such a way as is considered prejudicial agair.t the good name and integrity of the Royal Federation of Malaya Police and the Federation as a whole in that whilst you were on your way from Songkhla to Kedah you were found to be in possession of about 400 lbs. of opium and thereby rendering yourself liable to be dismissed in accordance with G.O. Cap. 'D' 38;"

and he was required to give his explanation in writing of the grounds he would offer in exculpation before January 15, 1964.

At some date between July 10, 1963 (when he was still in the Thai prison) and January 1964, the applicant recovered his freedom and on January 6, 1964 his solicitor replied to the Police Force Commission objecting again to the new charge and demanding a "a proper inquiry conducted in accordance with the law." It concluded with an intimation that the applicant was reporting for duty that very day at Kuala Lumpur.

On March 21, 1964, the Police Force Commission informed the applicant that a committee would be appointed shortly under Cap. D. 38 of General Orders to inquire into the matter. This was followed by a letter dated April 13, 1964 stating that a committee had been appointed by the Police Force Commission in accordance with Cap. D., regulation 38(c) to investigate the charge against him, and that he would be notified of the time, date and place of the sitting of the committee.

Despite these last two letters the applicant filed his notice of motion herein on April 16, 1964. Application for leave had been filed on March 14, 1963 and granted by Gill J. on April 8, 1964.

The committee had appointed May 27, 1964, for the inquiry to take place, but this had to be put off by reason of these proceedings in court.

I was surprised, to say the least, at the applicant's impetuosity in making this application. In view of the action taken by the Police Force Commission, pursuant to regulation 38, I could not see that the application had any useful purpose to serve. Jumping the gun was futile unless an order of this court could prevent the committee from holding any inquiry at all. Even had I the power to do so, I should certainly have refused, in the public interest, to stifle an inquiry into the conduct of a police officer of no insignificant rank allegedly caught in *flagrante delicto* while attempting to smuggle Thai opium into Malaya. The applicant is a public officer, subject to General Orders, and the committee ought to proceed with its inquiry as to whether or not he had acted in a manner to merit dismissal. This application was clearly premature. In any event *certiorari* is a discretionary relief which ought to be refused in the circumstances.

Furthermore, in my opinion, this application was misconceived. When application was filed on March 14, 1964 for leave to apply for an order of *certiorari*, the ground of application was that the Commissioner of Police had no jurisdiction to exercise any of his purported powers under regulation 43 of the Public Officers (Conduct and Discipline) Regulations, 1956. That might well have served as a good and sufficient ground. had an additional charge of misconduct not been framed under regulation 38. This had been done as early as November 25, 1963, and the applicant had been so informed in writing.

I had no hesitation in holding that a conviction on a criminal charge in a foreign country could not be considered as falling within the provisions of regulation 43, which reads as follows:

"43. An officer convicted on a criminal charge against whom proceedings under regulation 40 are contemplated shall be suspended from the exercise of his office and shall not receive any emoluments from the date of conviction pending a decision in his case by the Disciplinary Authority."

However, I did not think that the order of the Commissioner of Police, in suspending the applicant from duty, was necessarily invalid by reason only of the fact that he had purported on February 27, 1963, to do so under regulation 43. The subsequent new charge under regulation 38 had the effect of cutting the ground entirely from under the applicant's feet because the action taken rested no longer on the doubtful premise of a conviction abroad.

It has to be remembered that section 52(1) of the Police Ordinance, 1952, gives the Commissioner of Police powers to interdict an officer from duty. It reads as follows:

"52(1). If he deems it necessary in the public interest that a police officer should cease to exercise the powers and functions of his office instantly, the Commissioner may interdict from duty such police officer, and for the same reason a Commanding Officer may interdict from duty any non-gazetted police officer, pending any enquiry into the conduct of such police officer under the provisions of this Ordinance or any regulation or order applicable to other public officers of corresponding status in the service of the Government of the Federation, but such police officer shall not, by reason of such interdiction, cease to be a police officer."

There is no mystique in the word "suspend" used in the letter of February, 1963. The Commissioner of Police could equally well have exercised his power then to interdict under section 52(1) of the Police Ordinance. In either case the effect was the same, and for this reason I was satisfied that the Commissioner of Police by his order of February 27, 1963, had in no way exceeded his authority, so as to justify an order of *certiorari*.

Finally, as to the law, *certiorari* lies only in respect of judicial, as distinguished from administrative, acts. In suspending the applicant from duty, after coming to hear of his arrest,

the Commissioner of Police was only doing what any head of department should have done in his administrative capacity. The concluding paragraph of the Commissioner's letter of February 27, 1963, that "proceedings under regulation 40 of the same Regulations are being contemplated and during the period you will receive no emoluments pending a decision by the Disciplinary Authority" left no room for doubt that the Commissioner made the order as an administrative officer who had to act promptly pending a proper inquiry to be held in due course. There was nothing even remotely *quasi*-judicial about the act. To conclude, I need only quote one case, *R.* v. *Metropolitan Police Commission, Ex parte Parker*,(1) in which Lord Goddard C.J. said:

". . . where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of *certiorari* and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has."

For the above reasons I had dismissed the application summarily with costs.

Application dismissed.

CHAI KOI v. WONG YIT CHEN & ANOR.

[O.C.J. (Ong J.) July 29, 1964]

[K.L. — Civil Suit No. 227 of 1963]

Damages — Claim for — Earlier application for compensation under Workmen's Compensation Ordinance — Election — Whether effective.

Workmen's Compensation Ordinance, 1952, s. 20.

This was a claim for damages by the administrator of the estate of Ter Hong Hui deceased on behalf of the widow and infant son who were dependants of the deceased. It was alleged that the death of the deceased was due to the negligent driving of the first defendant who was the servant and agent of the second defendant. The deceased was at the time of his death employed as a lorry driver by a merchant who had taken out a Workmen's Compensation Insurance Policy for him. The deceased's father had applied to the Commissioner for Labour for payment of compensation to the dependants of the deceased. An inquiry was held and orders for compensation to the widow and the son were made. The widow had not attained the age of majority at the date of the inquiry. The defence in the action was based on section 20 of the Workmen's Compensation Ordinance in that compensation had already been applied for under the Ordinance.

Held: (1) no effective election had been made in this case as the widow was unaware of her common law right and could not therefore have made a valid election;

(2) as the Commissioner for Labour had failed to record the agreement for payment of compensation, there was in effect no agreement on the record and even if there was it was not legally binding on the widow who was still an infant;

(3) the mere fact that the widow had pursued one of two alternative remedies in ignorance of her rights will not prevent her from afterwards pursuing the other and therefore judgment must in this case be given in favour of the plaintiff.

Cases referred to:—

(1) *Scarf* v. *Jardine* L.R. 7 App. Cas. 345, 353, 360.

(2) *Perkins* v. *Hugh Stevenson & Sons Ltd.* [1940] 1 K.B. 56.

(3) *Huckle* v. *London County Council* (1909-10) 26 T.L.R. 580 and (1910-11) 27 T.L.R. 112.

(4) *Olson* v. *Magnesium Castings and Products Ltd.* [1947] 1 All E.R. 333.

(5) *Young* v. *Bristol Aeroplane Co. Ltd.* [1946] 1 All E.R. 98.

(6) *Narayaniamma* v. *Mohamed Din* [1959] M.L.J. 109.

CIVIL SUIT.

Kam Woon Wah for the plaintiff.

Lall Singh Muker for the defendants.

Cur. Adv. Vult.

Ong J.: This is a claim for damages by the administrator of the estate of one Ter Hong Hui, deceased, on behalf of the widow and infant son who were dependants of the deceased, under section 7 of the Civil Law Ordinance, 1956. It was alleged that the death of the deceased was due to the negligence of the first defendant who was the servant and agent of the second defendant.

On March 2, 1962, on the Puchong-Klang Road a head-on collision occurred between two motor-lorries in broad daylight, as the result of which the deceased, who was driving BE 8634, and his attendant both died of their injuries. This vehicle was travelling on its own proper side of the road; the other, BE. 487, which collided with it, was not. There is no question. therefore, that the first defendant was negligent in driving on the wrong side of the road.

The deceased was at the time of his death employed by a merchant, Tan Kai Kew, who had taken out a Workmen's Compensation Insurance Policy for the driver of this lorry. The deceased's father duly applied to the Commissioner for Labour, Port Swettenham, for payment of compensation under the Workmen's Compensation Ordinance, 1952, to the dependants of the deceased. The Assistant Commissioner for Labour then held an inquiry under section 27 of the Ordinance. According to the notes taken at such inquiry, the deceased's widow, Tee Ter, was appointed with her own consent as the representative of her son, Ter Soon Huat, aged 2 years, under regulation 47 of the Workmen's Compensation Regulations, 1953. The objects of such inquiry were (1) to determine the number of dependents, if any, of the deceased and the degree of their dependency; and (2) to distribute the compensation of $4,529.88 deposited with the